Public Prosecutor v Abdul Razak bin Johari

HIGH COURT (KUALA LUMPUR) — FEDERAL TERRITORY CRIMINAL TRIAL NO 58-26-88
JAMES FOONG JC
27 SEPTEMBER 1990

Evidence — First information report — Failure to produce — Evidence of arresting officer relied on — Adverse presumption — Evidence Act 1950, s 114(g)

Criminal Procedure — Arresting officer sole witness — Failure to produce first information report — Effect on prosecution evidence

The accused was charged with possession of 283.32g of cannabis. The prosecution relied solely on the evidence of one vital witness, the arresting officer. His first information report was not tendered in evidence.

Held, acquitting the accused without calling his defence:

(1) So fundamental and important was the evidence of the arresting officer that the prosecution should have tendered the first information report which was purported to be made by him.

(2) Failure to produce this first information report was a very serious omission and was fatal to the prosecution since the whole of the case depended on the testimony of the arresting officer. It also deprived the defence of an opportunity to cross-examine the arresting officer on the report.

(3) Failure to produce the first information report also raised the presumption of s 114(g) of the Evidence Act 1950 that the report which could have been produced and not been produced would, if produced, have been unfavourable to the complainant.

[Bahasa Malaysia summary

Tertuduh telah dituduh dengan milikan 283.32g cannabis. Pihak pendakwa bergantung hanya kepada keterangan seorang saksi yang penting yakni pegawai yang melakukan tangkapan. Laporan maklumat pertamanya tidak dimasukkan sebagai keterangan.

Diputuskan, membebaskan sidituduh tanpa dipanggil pembelaannya:

(1) Keterangan pegawai yang melakukan tangkapan adalah begitu asas dan penting. Pihak pendakwa seharusnya memasukkan laporan maklumat pertama yang kononnya dibuat oleh pegawai itu.

(2) Kegagalan untuk megemukakan laporan maklumat pertama ini adalah satu pelangkauan yang serius dan menyebabkan kes pendakwa gagal kerana keseluruhan kes pendakwa bergantung kepada testimoni pegawai yang melakukan tangkapan itu. Ini juga menghalang defendan daripada mendapat peluang untuk melakukan pemeriksaan balas terhadap pegawai yang berkenaan atas laporan itu.

(3) Kegagalan untuk mengemukakan laporan maklumat pertama itu juga menimbulkan anggapan di bawah s 114(g) Akta Keterangan 1950 bahawa laporan yang boleh dikemukakan itu yang telah tidak dikemukakan, jika dikemukakan, adalah tidak menyebelahi pengadu.]

Cases referred to

1 *Tan Cheng Kooi & Anor* v *PP* [1972] 2 MLJ 115 (folld)
2 *PP* v *Foong Chee Cheong* [1970] 1 MLJ 97 (folld)
3 *Teo Thin Chan & Anor* v *PP* [1957] MLJ 184 (folld)

Legislation referred to

Dangerous Drugs Act 1952 s 39
Evidence Act 1950 s 114

Hafilah bte Daud (Miss) (Deputy Public Prosecutor) for the Public Prosecutor.
Anthony Fernandez for the accused.

Cur Adv Vult

James Foong JC: The accused is charged for the following offence:

> Bahawa kamu pada 26 Mac 1988 jam lebih kurang 4.30 petang, di Jalan Raja Abdullah, di dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan, telah melakukan kesalahan mengedar dadah merbahaya, iaitu ganja seberat 283.32g dan dengan itu kamu telah melakukan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39(B)(2) Akta yang sama.

The evidence for the prosecution was that on 26 March 1988 at about 4.30pm, one Constable Ahmad Sabri (PW2) attached to the Cawangan Anti Dadah (CAD), Kuala Lumpur, arrested the accused at a bus stop along Jalan Raja Abdullah, Kuala Lumpur.

PW2 made the arrest while on his way home after work. PW2 noticed the accused acting in a suspicious manner and was in a 'kelam kabut' condition at the said bus stop.

From the bag (P5) which was carried by the accused at the material time, PW2 recovered altogether 1,000 sticks of ganja tied into 40 bundles.

PW2 arrested the accused at the said bus stand and brought him back to the Cawangan Anti Dadah office. There PW2 said he made a police report and then handed the exhibits to PW3, the investigating officer of this case. PW3 testified that he commenced investigation relying on a police report bearing No 4510/88.

The substances suspected of drugs recovered from the accused were sent to the chemist for analysis. It was found to contain 283.32g net weight of cannabis.

At the close of the prosecution case, defence counsel submitted that the prosecution has failed to prove a prima facie case against the accused for the reason that the first information report was not tendered in evidence.

After perusing the notes of evidence and the authorities submitted, I acquitted and discharged the accused without calling for his defence.

I find that the prosecution case relied solely on one vital witness, PW2. PW2 was the only person at the scene of the crime. Therefore virtually the whole case depended on what he said happened on that particular day. So fundamental and important is this witness that the prosecution should have tendered the first information report which was purported to be made by him.

This report made at the early stages of the arrest, when the memory of the complainant was fresh with less likelihood of fabrication, would have offered the accused a chance to compare with what the complainant is now testifying in court.

In adopting the views of Chang Min Tat J in *Tan Cheng Kooi & Anor* v *PP*,[1] where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine the complainant.

Again as expressed by Gill J (as he then was) in *PP* v *Foong Chee Cheong*,[2] 'the absence of a first information report casts a cloud of suspicion and tends to weaken the prosecution case'.

Failure to produce this first information report is a very serious omission and is fatal to the prosecution since the whole of this case depended on the testimony of PW2 who implied that he did make a police report which would have been a first information report.

Again in full agreement with the decision of Smith J in *Teo Thin Chan & Anor* v *PP*,[3] failure to produce this first information report raises the presumption of s 114(g) of the Evidence Act 1950 that the report which could have been produced and not been produced would, if produced, have been unfavourable to the complainant.

Section 114(g) of the Evidence Act 1950 is hereby presumed against the prosecution in this case, and in view of the facts as stated above, the accused is thereby discharged and acquitted without having been called to make his defence to the charge.

Accused acquitted.

Solicitors: *Fernandez & Partners.*

Reported by *Mathavan Devadas*

Public Prosecutor v Paneerselvan & Ors

HIGH COURT (PENANG) — CRIMINAL TRIAL NO 47-19-88
EDGAR JOSEPH JR J
3 AUGUST 1990

Evidence — Corroboration — Former statement of witness — Probative value versus prejudicial effect — Evidence Act 1950, s 157

Words and Phrases — 'Statement' — Evidence Act 1950, s 157

Words and Phrases — 'At or about the time' — Evidence Act 1950, s 157

During the testimony of the prosecution's undercover agent, the prosecution sought to admit into evidence his written record of his meetings with the accused persons. These records were made soon after the witness's meeting with the accused persons.

Held, disallowing the prosecution's application:

(1) The object of s 157 of the Evidence Act 1950 was to admit statements made at a time when the mind of the witness was so connected with the events as to make it probable that his description of them would be accurate.

(2) 'Statement' in s 157 of the Evidence Act 1950 means 'something that is stated' and the element of communication to another person is not included in it.

(3) 'At or about the time' in s 157 of the Evidence Act 1950 means that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself.

(4) Once it was accepted that the statement is relevant and admissible, the court must decide if the probative value of the statement is outweighed by its prejudicial value. The undercover agent was, for all intents and purposes, an agent provocateur. In view of his role, it would be natural for him to support the prosecution case. Accordingly, out-of-court statements of the kind that was sought to be admitted would be of trifling weight. Their prejudicial value would however be considerable. The court would, therefore, in the exercise of its discretion exclude them as corrobation under s 157.

(5) The evaluation of the testimony of the witness, in particular, the assessment of his credibility, reliability and accuracy of recollection could only be performed at the close of the case for the defence, unless the testimony suffers from the defect of being so inherently incredible that no reasonable person could accept it as being true.

[Bahasa Malaysia summary

Semasa agen pengintip rahsia sedang memberi testimoninya, pihak pendakwa cuba memasukkan rekod bertulis yang dibuat oleh agen itu mengenai pertemuannya dengan tertuduh sebagai keterangan. Rekod itu disediakan sebaik sahaja saksi itu bertemu dengan tertuduh.

Diputuskan, menolak permohonan pihak pendakwa:

(1) Objek s 157 Akta Keterangan 1950 adalah untuk menerima kenyataan yang dibuat pada masa apabila fikiran saksi adalah begitu berkait dengan kejadian sehingga apa yang diterangkan oleh saksi itu menjadi sesuatu yang tepat.

(2) 'Kenyataan' di dalam s 157 Akta Keterangan 1950 bererti 'sesuatu yang dikatakan' dan elemen komunikasi kepada seorang yang lain tidak termasuk di dalamnya.